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IN THE

Supreme Court of the United States

ANDREW J. ORKIN, F. MARK ORKIN
and SARAH-ROSE JOSEPHA ADLER,

Petitioners,

v.

ELIZABETH TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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Petitioners respectfully submit this reply brief in response to the respondent's opposition brief and in further support of their petition for a writ of certiorari.

This case is not merely "intriguing," as respondent says (Resp. Br. at 1), but is a cert-worthy vehicle for this Court to address the significant issues it raises. Because this case comes here on a motion to dismiss, all of petitioners' allegations are deemed true,[1] and the record is clear and uncontested. Petitioners are really only asking for the opportunity to prove their allegations according to settled rules of law, from which rules the lower courts departed radically, and for the opportunity to show the district court that they are entitled to their day in court, with the benefit of this Court's guidance about how such claims should be litigated.

Amici curiae B'Nai Brith Canada, the South African Jewish Board of Deputies, the Center for Holocaust and Genocide Studies of the University of Minnesota, and the Holocaust Restitution Claims Practicum of Cardozo Law School have attested in their briefs to the profound implications of this case, which transcend the interests of the parties over the ownership of one painting. Writing for the latter two *amici*, Prof. Michael Bazyler and Dr. Lucille Roussin state:

> *Amici* are concerned that the summary dismissal of the petitioners' well-founded and well-pleaded claims by the courts below on statute of limitations grounds, if allowed to stand, *will have a chilling effect on the outcome of future and current unresolved claims involving Holocaust-era looted art.* It is imperative that the law reasonably reflect the difficulties in establishing provenance of artworks looted during times of war, and especially during the Second World War.

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1. Respondent acknowledges as much, *see* Br. in Opposition at 2 n.3.

> Historically, the Holocaust represents the most extreme example of pillage of property that has been a prelude to almost every genocide. *Amici*'s involvement in this case is rooted in their conviction that *the restitution of Nazi-looted property to its rightful owners is an integral part of efforts to ensure that the law does not sanction genocide and pillage*.
>
> Br. of Center for Holocaust and Genocide Studies ("CHGS brief") at 2 (emphasis added).

I. The Ninth Circuit Ignored Ancient And Recent Controlling Case Law From The Supreme Court Of California Regarding Delayed Discovery And Accrual Of Claims. This Alone Is Grounds For Granting Certiorari.

In dismissing petitioners' claims, the Ninth Circuit and the district court relied entirely on Cal. Civ. Proc. Code § 338(c), which created a three-year statute of limitations, and on *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103 (1988), which held that a cause of action accrued when a plaintiff discovered, or reasonably could have known of, the existence of a claim to property. In rejecting the approach of *Naftzger v. Am. Numismatic Soc'y*, 42 Cal.App.4th 421 (2d Dist. 1996) in favor of a rule it purported to deduce from *Jolly*, the Ninth Circuit concluded "that it is highly unlikely that the California Supreme Court would abandon the *Jolly* rule, much less adopt a new rule that eschewed the concept of constructive notice." (487 F.3d at 741).

The Ninth Circuit's approach is clearly erroneous for three reasons:

> (1) It ignores ancient and recent controlling case law from the California Supreme Court adopting the delayed discovery rule and clarifying when knowledge can be imputed;
>
> (2) It incorrectly assumes that a cause of action for theft necessarily accrues when the identity of the possessor becomes known (as opposed to when the

> rightful owner knows, or ought reasonably to know, that a wrong has been done); and
>
> (3) It contravenes compelling public policy, including the concern that plaintiffs should not be required to sue precipitously, before the evidence reasonably available to them is sufficient to show that they have legitimate claims.

The recent controlling case of *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797 (2005) is an exhaustive treatment of the long-accepted delayed discovery rule, recognized in California at least since *Kimball v. Pacific Gas & Electric Co.*, 220 Cal. 203 (1934). In *Fox*, the California Supreme Court said:

> We conclude that, under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, *unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action.* In that case, *the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis.* 35 Cal.4th at 803 (emphasis added).

In affirming the delayed discovery rule, the California Supreme Court reviewed and consolidated its earlier decisions on the subject, including *Jolly* and *Norgart v. Upjohn Co.*, 21 Cal.4th 383 (1999). The Court repeated, based on these earlier decisions, that accrual occurs when the plaintiff has "inquiry notice" of *all* of the "generic elements" of the cause of action. These "generic elements" include "wrongdoing" in addition to "cause" and "harm" (*Norgart, supra*, 21 Cal.4th at 397; *Jolly, supra*, 44 Cal.3d at 1107, 1109-14; *Fox, supra*, 35 Cal.4th at 807).

Thus, the plaintiff in *Fox* could proceed with an otherwise untimely claim against a medical device manufacturer, because

the Court found that she could not reasonably have known of the existence of her claim until the key facts were revealed during the deposition of her treating physician. Recently, the delayed discovery rule was applied, and *Fox* followed, in *E-Fab, Inc. v. Accountants, Inc. Services*, 153 Cal.App.4th 1308 (4th Dist. 2007), to permit the plaintiff to proceed with a claim of negligent misrepresentation, when the facts of the misrepresentation were only learned years later. The court held the action timely: "in actions where the [delayed discovery] rule applies, the limitations period does not accrue until the aggrieved party has notice of the facts constituting the injury." *Id.* at 1318; citing *Fox*.

The California Supreme Court further confirmed in *Fox* that knowledge of the defendant's identity is not "normally" an element of a cause of action, and that knowledge or ignorance of this fact will neither trigger nor delay accrual (*Fox, supra*, 35 Cal.4th at 807, *quoting Norgart, supra*, 21 Cal.4th at 399, *quoting Bernson v. Browning-Ferris Industries*, 7 Cal.4th 926, 932 (1994), which in turn cited *Jolly, supra*, 44 Cal.3d at 1114). In *Bernson*, however, the Court recognized that the defendant's identity might be an element in some exceptional contexts.

Applying *Bernson*, *Naftzger* was addressed to the element of the defendant's identity in such a context, namely that of stolen art (42 Cal.App.4th at 431). In concluding that actual knowledge of the possessor's identity was an element of the § 338(c) claim, *Naftzger* sought to distinguish its subject matter from the products liability claims in *Jolly* and *Norgart* (in which identity was not an element), and explain how the unusual nature of stolen artwork brought such claims within the exception set out in *Bernson*. However, with respect to the generic elements of all causes of action, namely wrongdoing, cause and harm, *Naftzger* is consistent with *Jolly*.

Thus, even if the defendant's identity is not an element of the cause of action and *Naftzger* is disregarded, a cause of action for theft cannot accrue under *Jolly*, *Norgart* and *Fox* until *all* elements of the theft are known or at least reasonably suspected.

Moreover, *Fox* holds that, *irrespective of whether the identity of the possessor is known*, a claim concerning stolen property will survive a motion to dismiss if the plaintiff pleads the facts regarding the delayed discovery of the theft, namely "(1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence" (35 Cal.4th at 808, *quoting McKelvey v. Boeing North American, Inc.*, 74 Cal.App.4th 151, 160 (1999); emphasis in original).

In the present case, the Ninth Circuit's holding of accrual was founded on the single element of defendant's identity and its conclusion that "Taylor's acquisition of the painting was certainly discoverable at least by 1990" (487 F.3d at 741). Yet *Fox* states that accrual occurs only when *all* generic elements are revealed by a reasonable investigation. Thus, in concluding that the "apparent" discoverability of respondent's identity necessarily rendered petitioners' claim untimely, and in citing *Jolly*'s constructive knowledge rule as the sole basis for dismissing petitioners' claims, the Ninth Circuit ignored the contrary, and controlling, holding of the California Supreme Court, failed to apply the correct test for the accrual of petitioners' claims, and ignored their allegations regarding delayed discovery, which had to be deemed true.

As elaborated in the CHGS *amicus* brief at 13-16, the Ninth Circuit failed to recognize that petitioners' pleadings amply satisfied the *Fox* requirements for delayed discovery.[2] The lower courts also failed to consider, as *Fox* required, that petitioners had alleged that a reasonable investigation would not have revealed the factual basis for their claims earlier, given the circumstances of the Holocaust, and the actions taken since 1963

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2. Plaintiff alleged both the time and manner of discovery and their inability to have made earlier discovery despite reasonable diligence at ¶¶ 103-07 of petitioners' amended complaint. *See also* Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, January 31, 2005, at 18-19; Appellants' Brief in the Ninth Circuit at 16-17, 26-27, 70-71, 75-76.

by Sotheby's, Christie's and the respondent to obscure the Holocaust-era provenance of the painting.[3]

See also Bernson, supra and *Kimball, supra*, in which the California Supreme Court held (in 1994 and 1934 respectively) that concealment by the defendant of an element of a cause of action (which petitioners allege here) would toll the statute of limitations, and reversed the lower court's summary dismissal of the complaint. "The problem [of delayed discovery] arises not infrequently when the owner of stolen artwork discovers its whereabouts many years after the theft and files an action to recover the property." *Bernson, supra*, 7 Cal.4th at 933.[4]

The Ninth Circuit also ignored the public policy implications. California courts have consistently emphasized the importance of public policy in the discovery rule: "[S]tatutes [of limitations] should not be interpreted so as to bar a victim of wrongful conduct from asserting a cause of action before he could reasonably be expected to discover its existence." *Saliter v. Pierce Brothers Mortuaries*, 81 Cal.App.3d 292, 297 (1978). The discovery rule "protects the plaintiff, whose cause of action is preserved when, despite diligent investigation, he is blamelessly ignorant of the cause of his injuries. It also protects the defendant, who is spared precipitous litigation." *Bastian v. County of San Luis Obispo*, 199 Cal.App.3d 520, 529 (1988).

The *Fox* court also affirmed the importance of discouraging premature litigation:

> It would be contrary to public policy to require plaintiffs to file a lawsuit at a time when the evidence available to them failed to indicate a cause of action . . . Indeed, it would be difficult to describe a cause

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3. *See* 17-31, 104, 107 of petitioners' amended complaint; Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, January 31, 2005, at 2 and 19; Appellants' Brief in the Ninth Circuit at 10-12, 73-75.

4. The trial judge whose decision was reversed in *Bernson* later became the district judge who rendered the decision under review in this case.

> of action filed by a plaintiff, before that plaintiff reasonably suspects that the cause of action is a meritorious one, as anything but frivolous . . . In sum, the interest of the courts and of litigants against the filing of potentially meritless claims is a public policy concern. 35 Cal.4th at 815 (citations and quotation marks omitted).

The district court here said that petitioners "fail[ed] to allege any diligence on Plaintiffs' part, much less any reasonable diligence," *Adler v. Taylor*, 2005 U.S. Dist. LEXIS 5862 at *13 (C.D.Cal., Feb. 2, 2005), and this finding was affirmed on appeal. But this is flatly contradicted by the record (*see* n.2 and 3, *supra*). In 1963 (when, according to the lower courts, the cause of action first accrued), Margarethe Mauthner had been dead for sixteen years. Her direct heir, petitioners' grandfather and the only other heir who might have had knowledge of the facts of Mauthner's loss of the painting, was then 86 years old, in ill health and in South Africa. How could the cause of action be considered "complete with all of its elements" (*Fox*, 35 Cal.4th at 806) in 1963, when there was no heir alive who had reason to suspect the existence of a claim?

Having no art expertise, petitioners allege that they (like thousands of other Holocaust art claimants) reasonably only began to investigate the possibility of wrongdoing with respect to Mauthner's art collection when the subject and issues of Nazi-looted art came to public attention in the late 1990's. They then spent two years performing exhaustive research, in five countries and three continents, before they discovered the obscured and hitherto unavailable facts demonstrating that they had a cause of action, enabling them to file a non-frivolous complaint. For a court then to dismiss their claims because they took too long would be either to punish them for their diligence or require them to have brought an action without full knowledge of the facts. It would also punish them for offering to mediate their dispute with respondent (which offer was rebuffed) or their efforts to negotiate a resolution (which process was abruptly

terminated by respondent's precipitous declaratory judgment action).

The overarching concern highlighted in the *amici* briefs is that claims concerning Nazi-looted art are not ordinary stolen property claims. As the *amici* argue, the resolution of such claims must consider both the context of the Holocaust and its persistent and pernicious aftermath, and consistent and strong U.S. public policy. The lower courts' rigid approach to statutes of limitations ignored the well-established and controlling delayed discovery rule; disregarded the allegations of petitioners' due diligence; improperly and summarily resolved issues of fact as to that due diligence; and turned away from consistent U.S. policy that restitution must be promoted and not hindered by the reflexive application of state statutes of limitation.

II. This Case Is Not, As Respondent Asserts, Only About State Statutes Of Limitations. Long-Standing U.S. Government Policy Regarding Restitution Of Nazi-Looted Artworks Preempts Contrary State Law Governing Accrual Of Claims.

Statutes of limitations are properly areas of state jurisdiction, absent constitutional constraints (*Norgart*, 21 Cal.4th 383 at 396-97). But with respect to Nazi-looted art, a compelling constraint *is* present. If state law is permitted to defeat such claims summarily, the consistent and long-standing U.S. government policy requiring restitution will be vitiated. Thus that policy must prevail under the Supremacy Clause.

The three 1998 federal statutes, when interpreted in light of consistent pronouncements of U.S. officials and Military Government Law No. 59, create an implied right of action pursuant to *Cort v. Ash*, 422 U.S. 66 (1975). Respondent's opposition brief erroneously says (at 5) that this implied right of action is limited to the "Sense of Congress" provision of the Redress Act (§ 202). But, like the Ninth Circuit, respondent ignores the clear statement, at § 201(5), that "the same international legal principles applied among states [described

at § 201(1)-(3)] should be applied to art and other assets stolen from victims of the Holocaust."

Moreover, as argued in the CHGS brief (at 4-10), U.S. policy can be effectuated by the preemption principles of *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). In *Garamendi*, this Court held that, in view of U.S. policy expressed in various international executive-branch agreements regarding the handling of Holocaust-related insurance claims, California legislation placing reporting requirements on insurance companies constituted improper state intrusion and was preempted.

Garamendi should be read for the proposition that state statutes of limitations must not be construed so as to defeat claims that the executive and legislative branches have repeatedly said should be adjudicated on their merits. Just as the California Legislature was held to have interfered with the U.S. government's conduct of foreign relations in that case, the Ninth Circuit similarly interfered with the U.S. government's policy of restitution when it summarily dismissed petitioners' claims.

The issues raised by this case continue to be of current importance. While preparing this reply brief, petitioners learned of two more cases involving Nazi-looted art. *See* Marlise Simons, *Heirs Make Huge Claims Over Dutch Works of Art*, New York Times, September 26, 2007 at E1 (claim by heirs of Dutch Jewish art dealer for 227 artworks recovered in Germany at the end of WWII and now in Dutch museums); and Robin Pogrebin, *A Dispute Over a Klimt Purchased in New York*, New York Times, September 26, 2007 at B5 (grandson of Viennese woman who died in the Holocaust claims that Klimt painting now in collection of Leonard Lauder was looted during WWII, and seeks restitution). As *amici* attest, this unprecedented trend can only be understood by recognizing the unique context of the Holocaust and its long unacknowledged impact on subsequent generations, and also on the global art market. Holocaust survivors and their heirs have only recently begun to

overcome the trauma they have experienced, and critical information and knowledge about the era has only recently become widely available. Books and films such as the just-released The Rape of Europa[5] are informing present generations about what happened at that time, and about the legitimacy of their pursuit of claims after more than sixty years. This Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) also brought these issues into the public consciousness.

Petitioners respectfully urge this Court to continue to speak to the profound issues raised by these cases, and to insure that settled law about the accrual of claims is equitably applied throughout the Nation. As more Holocaust survivors and their descendants only now learn of their rights and seek restitution of what is rightfully theirs, the need for uniformity in the just treatment of their claims becomes ever more pressing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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5. *See* Lynn H. Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* (1994), and the recent documentary film of the same name, whose website is *http://www. rapeofeuropa.com*)(last visited September 27, 2007).